SUPREME COURT, U.S.
FILED
OCT 19 1994
OFFICE OF THE CLERK

No. 94-395

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

LORI RABIN WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent does not dispute that a conflict exists among the courts of appeals on the recurring question whether a non-taxpayer may bring a "refund" suit under 28 U.S.C. 1346(a) to recover payments knowingly made to satisfy the tax obligation of another person. As we described in the petition, of the seven courts of appeals that have addressed this question, five have concluded that jurisdiction does *not* exist under this statute for non-taxpayer refund suits while two (including the Ninth Circuit in this case) have concluded that it does. See Pet. 7-10.

Respondent does not deny the existence of this irreconcilable conflict. Instead, respondent contends that, for four separate reasons, the present case is not a satisfactory vehicle for this Court to resolve that

frequently recurring question. None of respondent's rationales is correct.

1. Respondent first suggests that it is unseemly for this question to be addressed here because, in respondent's view, no taxes were in fact owed by anyone (Br. in Opp. 2, 5). Respondent broadly asserts that "[w]e are not in a situation where a party voluntarily pays the taxes of a third party, but rather under duress pays the taxes that *were not correctly determined to be owed* by the third party." *Id.* at 5 (emphasis original).

Respondent's assertion about the merits of the underlying assessments, of course, has no relationship to the jurisdictional issue that the courts below have addressed. Moreover, respondent provides no citations to the opinions below for her assertion, and the record does not support it. This "refund" case was dismissed for want of jurisdiction in the district court (Pet. App. 7a-18a). The court of appeals reversed on the jurisdictional question and remanded for further proceedings (*id.* at 1a-6a). No court has decided whether or not the taxes were "correctly determined to be owed by the third party."

Respondent nonetheless suggests that, *if* the courts below had jurisdiction and *if* the case went to trial on the merits, the government could not establish that the taxpayer (respondent's former husband) actually owed the taxes that respondent paid. Respondent bases this claim on the fact that the government did not dispute that respondent's husband had filed a notice (as of the end of 1987) that he was no longer a partner of the partnership whose activities gave rise to his tax liability (Br. in Opp. 6).

The fact that respondent's husband attempted to disclaim his partnership interest by filing a notice of withdrawal at the end of the second of the three years at issue (Br. in Opp. 6) does not, of course, immunize him

from the federal tax liabilities of the partnership for the periods preceding an effective withdrawal.[1] Moreover, it also has not been established that the notice of withdrawal filed by respondent's husband was sufficient to immunize him from liability for subsequent periods. The mere fact that a partner seeks to withdraw from a partnership does not necessarily establish that the withdrawal was effective, either under state law or under the terms of the partnership agreement. See *Young* v. *Riddell*, 283 F.2d at 910. Respondent plainly errs in flatly stating that none of the taxes assessed had been "correctly determined to be owed" (Br. in Opp. 5; emphasis deleted).

Respondent's husband did not, in any event, challenge the assessments for any of these periods. And, in the carefully defined situations where Congress has allowed *non*-taxpayers to challenge tax liens arising from taxes owed by third persons (see Pet. 11-13), Congress has expressly provided that the underlying tax assessments "shall be conclusively presumed to be valid" (26 U.S.C. 7426(c)). Respondent's effort erroneously to expand the jurisdictional limitations on tax "refund" suits permitted under 28 U.S.C. 1346(a) seeks to circumvent this express, statutory limitation on suits by third parties. In doing so, for the reasons described in detail in the

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[1] The notice was filed on the last day of 1987. The underlying federal employment tax liabilities of respondent's husband were for wages paid by the partnership from 1986 through 1988. See Br. in Opp. 6-7. It is well settled that a partner is liable for the unpaid taxes of a partnership (see, *e.g.*, *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960); *Underwood* v. *United States*, 118 F.2d 760, 761 (5th Cir. 1941)) and that the partnership's liability for federal employment taxes arises at the time the wages are paid (see 26 U.S.C. 3101(a), 3102(a), 3401(a) (1988 & Supp. IV 1992); *Otte* v. *United States*, 419 U.S. 43, 55 (1974)).

petition (Pet. 13-14), respondent's interpretation of the statute would provide a haven for delay and evasion of tax liabilities.

2. Respondent next asserts that the jurisdictional question on which the courts of appeals have divided should not be addressed in this case because, in respondent's view, respondent did not pay the taxes "voluntarily" (Br. in Opp. 7-8). Respondent asserts that, instead, she paid the taxes under duress (*ibid.*).

That contention is facially erroneous. Congress did not require respondent to pay these taxes; they were due only from her husband (Pet. App. 2a, 8a-9a). Congress also did not require respondent to pay the taxes in order to obtain a release of the federal tax lien on her husband's property (in which she also possessed an interest). Indeed, if respondent had followed the statutory mechanism that Congress provided, there would have been no need for a "refund" suit at all. Under 26 U.S.C. 6325(b)(3), a person whose property becomes subject to a tax lien arising from the activities of a third person may obtain an immediate certificate of discharge of the lien by agreeing with the Secretary to hold the proceeds of a sale of the property "as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property" (*ibid.*). The respective rights of the non-taxpayer and the United States in that fund (and, in particular, the validity of the federal tax lien in the property)[2] are then

[2] Although respondent contends that all of the federal tax liens involved in this case were invalid (Br. in Opp. 8), the court of appeals stated only that it was of the view that the government conceded at argument that one of the several liens filed by the United States "was not valid" (Pet. App. 4a). That issue, of course, has no bearing on the jurisdictional question decided by the court of appeals. Respondent's assertions about the merits of the underlying tax liens and assessments—which the government disputes and which no court has adjudicated—do not afford any basis for avoiding consideration of the necessary and preliminary jurisdictional question that was actually decided below, on which the courts of appeals are manifestly in conflict (see Pet. 7-10).

to be determined in a suit brought in federal district court under 26 U.S.C. 7426(b)(4).

Respondent cannot plausibly suggest that she paid taxes owed by her husband under duress when, under the applicable statutes, she was not required to pay the taxes at all, even in order to conclude her pending sale of the property. She was only required thereafter to submit to an orderly adjudication of her rights, which is not "duress."[3]

3. Respondent next asserts that the recurring conflict on this important jurisdictional question should not be addressed or resolved in this case because two district court decisions have recently disagreed with the government's position (Br. in Opp. 8-10). Several other district courts, and five of the courts of appeals, however, have agreed with the government's interpretation of this statutory scheme. See Pet. 7-10, 11-13. The fact that several recent decisions can be found on both sides of this recurring question merely emphasizes the need for this Court's resolution of the matter.

4. Respondent's final assertion is that the government's petition in this case sets forth a "novel" analysis of the statutory scheme that departs from the analysis that the government employed in the courts below and in previous briefs in other cases (Br. in Opp. 8). That contention is both inadequate and inaccurate.

[3] See, *e.g.*, *Ohio Locomotive Crane Co.* v. *Denman*, 73 F.2d 408, 411 (6th Cir. 1934); Pet. 10-12 & n.2.

It is inadequate because the government unquestionably properly raised the jurisdictional issue in this case. See Pet. App. 1a-6a, 7a-18a. Even if our briefing of that question in the petition emphasizes additional portions of the statutory scheme in explaining why the language of the statute supports jurisdiction only for suits brought by "taxpayers," that does not alter the question presented for disposition by this Court.

The government has long contended that only a "taxpayer" may bring a "refund" suit under this jurisdictional statute.[4] The government's analysis has been adopted in numerous decisions holding that a non-taxpayer may not bring suit under 28 U.S.C. 1346(a)(1). See Pet. 8, 10, citing, *e.g.*, *Pershing Div. of Donaldson, Lufkin & Jenrette Sec. Corp.* v. *United States*, 22 F.3d 741, 743 (7th Cir. 1994); *Snodgrass* v. *United States*, 834 F.2d 537, 539 (5th Cir. 1987); *Phillips* v. *United States*, 346 F.2d 999, 1000 (2d Cir. 1965); *Luce* v. *United States*, 444 F. Supp. 347, 348 & n.1 (W.D. Mo. 1977). See also *Economy Plumbing & Heating Co.* v. *United States*, 470 F.2d 585, 589-590 (Ct. Cl. 1972). Moreover, the same statutory provisions described in the petition were also described in the briefing below in this case, where the government pointed out that respondent did not qualify as a "taxpayer" authorized to bring a "refund" suit under the applicable statutes (U.S. C. A. Br. 27 n.18).

This case thus squarely frames and properly presents the important, recurring question whether a non-

[4] The fact that a non-taxpayer, such as respondent, files an administrative claim for adjustment of taxes, or a refund claim, does not convert her into the "taxpayer" for this jurisdictional purpose. See *Economy Plumbing & Heating Co.* v. *United States*, 470 F.2d 585, 590 (Ct. Cl. 1972), quoting *Ray* v. *United States*, 453 F.2d 754, 758 (Ct. Cl. 1972).

taxpayer may bring a "refund" suit to recover taxes knowingly paid on behalf of another party. For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1994